IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5636 OF 1988

Shri Subhash Dhala Kinjle ... Petitioner

V/s

Smt. Indra Rani Uggarsen ... Respondent

Mr. N.V. Walawalkar for the petitioner.

Mr. R.A. Thorat with A.N. Maniyar for the respondent.

CORAM: P.V. KAKADE, J.

DATED: 18TH APRIL, 2006

ORAL JUDGMENT:

1. Heard learned counsel for both sides. Perused the record.

2. The petitioner has preferred this petition against the judgment and order dated 13th October, 1988 passed by the lower appellate Court dismissing his appeal and confirming the judgment and order passed by the Trial Court dated 8th/11th April, 1983 decreeing the suit for possession of the suit premises under Sec. 13(1)(b) of the Bombay Rent Act.

3. The respondent plaintiff filed the suit for possession of the suit premises through her constituted attorney alleging that the petitioner defendant was tenant and without consent and knowledge of the plaintiff landlady constructed a loft of permanent nature in the rear side of the suit premises i.e. Room No. 10, Chawl No.2 in the plaintiff's property known as Indra Colony, situated at Kurar Village, Daftary Road, Malad (East), Bombay - 400 064. According to the plaintiff, the said loft is embedded in three sides of the wall and the said construction caused damages to the walls of the suit premises and thereby the defendant was not ready and willing to pay the rent and he was in arrears of rent since August, 1974. Hence advocate's letter dated 25.11.1974 terminating the tenancy of the defendant was issued but it was neither replied to nor complied with and hence the suit came to be filed.

The defendant challenged the suit inter-alia denying all the allegations made by the plaintiff submitting that the impugned loft was in the property since the beginning of the tenancy and there was no question of any new construction being made without permission of the landlady.

On the basis of the pleadings, issues were settled by the Trial Court and the matter was adjudicated on merits on the basis of available evidence. The Trial Court came to the conclusion that the plaintiff had proved that defendant had unauthorisedly constructed a loft of a permanent nature in the rear side of the suit premises causing damage to the suit premises. It is further held by the Trial Court that the plaintiff had proved that defendant is guilty of an act of waste. However, it was held that defendant was defaulter in payment of rent and on such and other grounds, the suit came to be decreed.

4. The appeal was carried to the lower appellate Court. The lower appellate Court came to the conclusion that the defendant had made unauthorised construction of the loft in the rear side of the suit premises which had also caused damage to the suit property and on that count the appeal came to be dismissed. Hence the present petition.

5. At the outset, it is to be noted that the defendant, in the course of his evidence has changed his stance as a result of which the record now reflects that it is a case sought to be made out by the defendant that he admits that the construction was made of the loft in the

suit premises and has stated that he had obtained oral permission from the plaintiff for construction of the same. There is, however, nothing on record to show that the defendant had obtained oral permission either from the plaintiff landlady or from her husband for construction of the loft. In view of this situation, there is no doubt thwatosever that the construction was made without consent of the landlady and that the construction in question is of permanent nature. It is also to be noted that the construction is embedded in the walls. There is also material on record to show that due to such construction the walls are damaged and, therefore, I have no doubt whatsoever that both the Courts below have recorded correct and concurrent findings to the effect that the matter is squarely covered by the provision of Sec. 13(1)(b) of the Bombay Rent Act.

6. The learned counsel for the petitioner submitted that the tenor of the Issue No.1 framed by the Trial Court show that the Court has framed the issue in fact under Sec. 13(1)(a) and not under Sec. 13(1)(b). However, I prefer to disagree with this proposition. The plain wording of Sec. 13(1)(b) would show that the facts revealed from the record are squarely covered by

the provisions of Sec. 13(1)(b) even though the Issue No.1 framed by the Trial Court mentions the word "damage" to the property.

7. The learned counsel for the petitioner also submitted that the landlady did not enter the witness box and therefore adverse inference is required to be drawn against her. However, it is to be noted that the evidence of landlady’s husband is recorded on her behalf and, in my considered view, the evidence of husband of the landlady would be still in better position as for all practical purposes he would be a person who is looking after the management of the property. No doubt that the defendant has tried to submit that construction made was within the knowledge of the landlady and, therefore, it could be a case of acquiescence on the part of the landlady. However, for want of any iota of evidence to that effect it cannot be said that it is a case of acquiescence by the landlady in making construction of the said loft.

8. The learned counsel for the petitioner also brought to my notice that the lower appellate Court did not frame proper point for determination so as to point out the correct controversy between the parties. The point

in question which was framed by the appellate Court is thus :-

> "Whether the impugned judgment and order of the trial Court dated 8th/11th April, 1983 is legal and proper ?"

The point is answered in the affirmative. It was submitted that the point framed by the lower appellate Court does not give proper indication as to the scope of controversy between the parties. No doubt, it is directed that the point for determination framed by the lower appellate Court is vague. However, in my considered view, it would not be fatal to the appeal and certainly would not change the fate of the dispute between the parties especially when the body of the judgment reveals that both the parties were given opportunity to argue the matter. It also reflects the application of mind of the lower appellate Court Judge to the entire set of evidence regarding disputed facts and, therefore, there is no infringement of the procedural aspects committed by the lower appellate Court. In this regard, reference must be made to the ruling of this Court in the case of **Genba Sahadu Modak v/s Suryakant Vitthal Modak & ors., reported in (2006) 1**

A.I.R. Bombay High Court Reports 347, wherein it was held that the appellate Court having each and every issue for discussion, appreciating it properly and applying his mind to the facts and legal aspects involved in the case, then there is material compliance with the provisions of order 41 Rule 31 of the Code of Civil Procedure and no prejudice is said to be caused to the appellant. Under such circumstances, failure to formulate detailed points for determination by the lower appellate Court would amount to mere irregularity.

10. The learned counsel for the respondent brought to my notice the Supreme Court ruling in the case of **Venkatlal G. Pittie and anr. v/s M/s. Bright Brothers (Pvt.) Ltd., reported in AIR 1987 SC 1939,** wherein the Apex Court has observed that simply because another view is possible and on that view a different view is taken, it would be interfering under jurisdiction under Art. 227 of the Constitution of India which would be unwarranted. In other words, what is laid down is the aspect that if two views are possible from given set of circumstances of fact on record and one view is taken by the lower Court, then it would not be a fit case for interference under Art. 227 of the Constitution of India, which, in fact has happened in the present case.

On perusal of the judgment of both the Courts below, it is apparent that they have chosen to take a particular view which is not only possible but also probable on the basis of facts and circumstances and, therefore, it cannot be said to be perverse especially when the Courts below have recorded concurrent findings holding that the

tenant has made unauthorized construction without consent of the landlady.

11. In view of this position, I have no doubt whatsoever that the reasoning adopted and finding recorded by both the Courts below on the relevant issue appears to be just, legal and proper and, therefore, it would brook no interference.

12. In the result, the petition stands dismissed with no order as to costs.

13. At this stage, the learned counsel for the petitioner sought stay of the abovesaid order. In view of the facts and circumstances, the decree for possession shall not be executed for the period of 12 weeks from the date of this order. During the period of stay, the petitioner shall not create third party

interest in the suit property and shall continue to pay the rent as per the agreement.

.....